To: Cal Bar Association
From: Dusty Collier
Re: 2008 Labor Law Student Writing Competition
Date: 8/1/08

To Whom It May Concern,

This cover letter is to verify that I, Dusty Collier, am solely responsible for all the following legal research and analysis presented in response to the question posed by this year's writing competition. I am a J.D. Candidate, Class of 2009, at the University of California at Berkeley, Boalt Hall School of Law. I also grant the administrators of the competition permission to publish the following Note with no expectation of payment or other compensation.

Please feel free to contact me if you have any questions, comments or concerns. I can be reached by e-mail at collierd@berkeley.edu (personal) or dcollier@beesontayer.com (work). I can be reached by telephone at (870)530-2279 (cell), (510) 922-9427 (home), or (510) 625-9700 (work). My address is 394 Orange Street, Apt. 12, Oakland, CA 94610.

Sincerely,
Dusty Collier

Fear in the Sphere:
Lifestyle Discrimination in the Digital Age

By: Dusty Collier

I. Introduction:

Recent increases in computer literacy have ensured that blogs will be a catalyst for litigation for the foreseeable future. The realm of labor law will be no exception to that trend. The average PC user now has a medium to the entire world, effectively creating a nation of modern-day town criers. Unfortunately, this means employees trying to express themselves in this new medium may be heard by unintended audience members (i.e. the boss), and many employees must live in fear of the consequences of their own online expression.

In this Note, I explore some features of California law that may provide a basis for protection of the employee-blogger. There are a wide range of potential sources of protection, none of which have been litigated enough to accurately evaluate their efficacy. As a result, predictions about the future state of blog protections are futile, creating an interesting period of speculation, creativity, and anxious anticipation.

Part II briefly addresses the strengths and weaknesses of a variety of potential protections, including: (1) California's lifestyle discrimination statute,[1] which seemingly protects employees engaged in "lawful conduct occurring during nonworking hours away from the employer's premises"; (2) California's whistleblower protections; (3) the National Labor Relations Act ("the Act"); and (4) the First Amendment.[2] Taken

[1] Cal. Labor Code § 96(k).

[2] Due to space constraints, the author has neglected several other relevant sources of possible protection, such as California's constitutional privacy right. California Constitution, Art. I, § 1

together, these various protections provide a complex picture of the state of blogger-employment law.

Despite these laws, employees have relatively little protection from adverse actions in retaliation for their blogging. In some situations, such as where the employee reveals proprietary information or manifests disloyalty, this may be the proper result. On the whole, however, California currently under-protects the employee who blogs and the Legislature should consider adopting a broader lifestyle discrimination statute that more appropriately accommodates the employee's interest in freedom from employer control outside the workplace.

II. Potential Sources of Protection:

A. California's Lifestyle Discrimination Statute: A New Hope or a Crushing Disappointment?

In response to the dearth of protections currently provided to at-will[3] employees for their lawful, off-duty conduct, some States have enacted so-called "lifestyle discrimination" statutes limiting the at-will employment doctrine.[4] In 2000, California enacted Labor Code § 96, providing, "The Labor Commissioner . . . shall . . . take assignments of . . . (k) Claims for loss of wages as the result of demotion, suspension, or discharge . . . for lawful conduct occurring during nonworking hours away from the employer's premises." Meanwhile, Labor Code § 98.6 was enacted to provide individuals subject to a violation of § 96(k) with a cause of action.

However, whatever hope these statutes may have once held for the employee-blogger has all but disintegrated, as the California Attorney General and later the 4th District Court of Appeal relied upon the legislative history to deny that the statutes

[3] *See* Labor Code § 2922.
[4] *See, e.g.*, N.D. Cent. Code § 14-02.4-01; C.R.S.A. § 24-34-402.5; Conn.Gen.Stat.Ann. § 31-51q.

created any new substantive rights.[5] Although our Supreme Court has yet to rule on the interpretation of these statutes, there is ample support in the legislative history for the reasoning of the 4th District. Thus, these statutes hold little hope of protecting the employee-blogger.

For example, an uncodified section of the statute states, "The Legislature finds and declares that . . . working men and women are ill-equipped and unduly disadvantaged in any effort to assert their individual rights otherwise protected by the Labor Code."[6] Nowhere, however, is there mention of any new substantive rights which would be created by passage of the Bill.

In *Grinzi*, a 13-year employee of a private Hospice corporation was allegedly terminated for her membership in a possible pyramid scheme.[7] She filed suit for wrongful discharge in violation of public policy and offered Labor Code §§ 96(k) and 98.6 as potential sources of the requisite public policy.[8]

The court rejected her argument, holding that Labor Code § 96 failed to create any substantive rights for California's workers, but instead provided a mere procedural device by which the Labor Commissioner could assert jurisdiction over claims brought under pre-existing law.[9] The court also relied on the legislative history and uncodified portions of Labor Code § 98.6 to hold that this section only protected employees engaged in conduct already protected by the Constitution and/or the Labor Code.[10] Further, the court held that any alternative interpretation would unduly infringe upon the at-will

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[5] 83 Op. Cal. Att'y Gen. 226 (2000); *Barbee v. Household Automotive Finance Corp.*, 6 Cal.Rptr.3d 406 (App. 4 Dist. 2003.); *Grinzi v. San Diego Hospice Corp.*, 14 Cal.Rptr.3d 893 (App. 4 Dist. 2004.)
[6] Stats.2001, ch. 820, § 1, p. 5201.
[7] *Grinzi*, *supra* note 5, at 78.
[8] *Id.* at 80.
[9] *Id.* at 84; *See also Barbee*, *supra* note 5, at 535.
[10] *Grinzi*, *supra* note 5, at 84.

employer's "general discretion to discharge an employee without cause under section 2922."[11]

While it appears that Labor Code §§ 96(k) and 98.6 will not afford protection to the blogging employee any time soon, our Supreme Court and other Courts of Appeal may still reach a conclusion different from that of the 4th District. Time will tell whether these sections vindicate or disappoint employees engaged in online expressive activity.

B. Whistleblowing on the Web:

While no exemplary cases have been tried to date, there are numerous whistleblower protections in California which ostensibly could apply to blogging employees.[12] For the sake of brevity, I focus here on only one of California's whistleblower protections: the common law tort for wrongful discharge in violation of public policy.

The otherwise unqualified right to discharge an at-will employee may be limited by statute or considerations of public policy.[13] This principle was first announced in 1959 by a Court of Appeal in *Petermann v. International Brotherhood of Teamsters,*[14] but it was adopted by the California Supreme Court in *Tameny* in 1980.[15]

To state a claim for wrongful discharge in violation of fundamental public policy, the plaintiff's dismissal must violate a policy that is (1) fundamental and substantial; (2) beneficial for the public at large; and (3) "tethered to" a statute or constitutional

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[11] *Id.* at 88; Cal. Labor Code § 2922.
[12] *See, e.g.*, Cal. Gov. Code § 12650 et seq.; Cal. Gov. Code § 8547 et seq.; Cal. Labor Code § 1102.5 et seq.; Cal Labor Code § 6310.
[13] *Tameny v. Atlantic Richfield Company*, 27 Cal.3d 167, 172, (1980).
[14] 174 Cal.App. 2d 184, 188 (1959).
[15] *Tameny*, *supra* note 13, at 172; *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1095, (1992).

provision.[16] Such claims arise in four general contexts where an employee has been discharged for (1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; or (4) reporting an alleged violation of a statute or regulation of public importance.[17]

An employee subjected to adverse action based on posts to a blog may assert this tort claim if the content of the posts falls under one of these four contexts. For example, if an employee is discharged for using his/her blog to report (1) violations of the Sherman Antitrust Act by the employer, (2) a failure by the employer to comply with regulations promulgated under the Federal Aviation Act, or (3) a failure by a legal employer to abide by the Rules of Professional Conduct, the employee can assert protection under this common law tort.[18]

There is no reason to distinguish between whistleblowers who blog and other whistleblowers. Why should the public policy embodied in the protections for employees who blow the whistle on an employer's immoral and unlawful conduct be diminished because the whistle was blown online? If anything, the enhanced efficacy of the employee's message that results from presentation to a significantly larger audience should *strengthen* the claim that discharge in retaliation therefor would be contrary to public policy. Thus, this common law tort and other California whistleblower protections should be extended to the employee-blogger.

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[16] *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1256 (1994); *Green v. Ralee Engineering*, 19 Cal.4th 66, 80 fn. 6 (1998).
[17] *Turner*, *supra* note 16, at 1256.
[18] These hypotheticals correspond to the fact patterns in *Tameny*, *Green*, and *General Dynamics*, respectively. *Tameny*, *supra* note 16, at 170; *Green*, *supra* note 24, at 73-83; *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1165, 1188 (1994).

C. Blogging for Mutual Protection: Online Concerted Activity Under the National Labor Relations Act

§ 7 of the National Labor Relations Act ("the Act") protects the right of employees, both public and private, to "self-organization, to form, join, or assist labor organizations" and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[19] The "mutual aid or protection" clause has been used to protect employees engaged in a variety of concerted activities entirely unrelated to union organization.[20] In 1947, the Labor Management Relations Act was enacted, amending § 7 to protect the additional right "to refrain from any and all such activities."[21]

If an employer interferes, restrains, or coerces an employee in the exercise of these rights, the employer will have committed an unfair labor practice under § 8(a)(1) of the Act.[22] Under § 8(a)(3), this prohibition extends to discrimination against employees who engage in protected activity under the Act.[23] Nothing in the Act suggests that activities will only be protected if they are performed through traditional or historic media, paving the way for another potential source of blogger-employee protections.

In order to be protected, the employee's actions must first be "concerted," meaning they are undertaken by two or more employees, or by one on behalf of others.[24] A single statement made by one individual to another can be sufficient to pass the "concerted activity" prong.[25] However, where a single employee acts only for his or her

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[19] 29 U.S.C. § 157. Hereinafter "§ 7."
[20] *See, e.g., Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir. 1981).
[21] 29 U.S.C. § 141 et seq.
[22] 29 U.S.C. § 158(a)(1).
[23] 29 U.S.C. § 158(a)(3)
[24] *Esco Elevators*, 276 NLRB 1245 (1985).
[25] *Office Depot*, 330 NLRB 640 (2000).

personal benefit, concerted activity will rarely be found,[26] even where the employee asserts a right enjoyed by fellow employees.[27]

Even assuming the employee's activity was "concerted," they must still establish that the activity was related to union organization or otherwise for "mutual aid and protection."[28] Activities for mutual aid and protection may include seeking to improve the terms and conditions of employment through fora outside the employee-employer relationship,[29] complaining to the employer's customers about working conditions,[30] attending a co-worker's arbitration hearing,[31] or reporting to state agencies about certain types of unlawful conduct by the employer.[32]

In sum, there is no reason why an employee who engages in protected § 7 activity should receive reduced legal protection just because the activity was engaged in online. To the contrary, the new online medium improves the ability of individual employees to reach out to colleagues with common interests, greatly facilitating the public policies behind the Act. The situations described above are just a few of many examples of activity for mutual aid and protection on the books, and any blogger seeking to utilize the NLRA's protections should carefully seek out analogous cases.

D. How Free is Your Speech, Really?

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech . . ."[33] However, private employees may not take advantage of the

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[26] *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980).
[27] *Meyers Industries (I)*, 268 NLRB 493 (1984).
[28] 29 U.S.C. § 157.
[29] *Mojave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000).
[30] *Compuware Corp. v. NLRB*, 134 F.3d 1285 (6th Cir. 1998).
[31] *Cadbury Beverages v. NLRB*, 160 F.3d 24 (D.C. Cir. 1998).
[32] *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999).
[33] U.S. Const., 1st Amend.

protections afforded by the First Amendment,[34] a fact too many employees discover only after they have been subjected to adverse action. Instead, the First Amendment only protects those whose First Amendment rights are abridged by *state* action, including public employees.[35]

Further, even public employees have no absolute shield for expressive activity, but rather must pass the *Pickering/Connick/Garcetti* analysis in order to receive protection.[36] First, the employee must have spoken "as a citizen upon matters of public concern."[37] However, public employees who make statements pursuant to their "official duties," even when it concerns such public matters, are not speaking as citizens within this doctrine and the speech will go unprotected.[38] Finally, even where the employee spoke as a citizen on matters of public concern, the court will proceed to weigh the employee's interest in his/her expression against the employer's interest in maintaining discipline and efficiency.[39] If the employer's interest outweighs, the employee's speech will be devoid of First Amendment protection.

Thus, where a public employee blogs about a matter of public concern,[40] he/she may assert a First Amendment claim when retaliated against for the blog. However, the employee must remain wary of the legitimate business interests of the employer. For example, while there can be no doubt that racial discrimination constitutes a matter of public concern, a public employee who sets up a Neo-Nazi blog will likely not be

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[34] *Grinzi*, *supra* note 5, at 81.
[35] *Id.*
[36] *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
[37] *Connick*, *supra* note 36, at 146-147.
[38] *Garcetti*, *supra* note 36, at 421-423.
[39] *Pickering*, *supra* note 36, at 568.
[40] *See, e.g., Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 U.S. 530 (holding that speech on controversial issues of public policy lies at the heart of First Amendment protection and constitutes a matter of public concern.)

protected, as the government employer will have a legitimate business interest in disassociating itself from such a message.

III. Concluding Remarks: Why Employees Need More

These are just a few areas where an employee who blogs may be protected by pre-existing law. However, these protections cover such a small fraction of the potential applications as to be relatively meaningless. For example, suppose the employer decides to terminate an employee because the latter posted an article criticizing the employer's favorite food. Under the current state of the law, the employee can lawfully be terminated for this and many other equally ridiculous reasons to fire someone.

Short of abrogating the at-will doctrine outright, the only way to protect employee autonomy and the right to blog would be to enact a broadly worded lifestyle discrimination statute that will not be subject to the narrow interpretation the 4th District has given to Labor Code § 96(k). Thus, the California Legislature should enact such a statute to ensure that employees can express themselves online free from fear of retaliation.